unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

It was argued here that all that was done was to agree to take delivery of and pay for the fuel, leaving the price to be settled by future arrangement. Once the price was agreed to (and that was to be at a reduced rate) and embodied in a formal contract, the accounts would be adjusted. What the defendants now say is that the execution of a formal contract incorporating the reduced price is a condition precedent to the existence of any binding arrangement. In my view the decision must however turn on the second paragraph of plaintiffs' letter of July 29, 1971:

"We wish to reiterate that the issuance of the carnet, on terms already familiar to you is only a temporary measure."

The Shorter Oxford English Dictionary meaning of "temporary" is

"lasting for a limited time; existing or valid for a limited time (only); transient; made to supply a passing need."

The question arises, what was the temporary arrangement? In view of the issuance of the carnet card arrangement, the answer is quite obvious. The defendants were obliged to pay if anyone, whether authorised or not, took delivery of the fuel by the presentation of the carnet (clause(4)). In my view no one could have had possession of the carnet except the defendants or their servants or agents (clause (1)). The defendants had been paying for such purchase for the amount stated in the invoices without any queries or objections. The price was to be that at the place of delivery. Then follows a reference to the preparation for a formal contract when details of pricing for off-shore airports and the defendants' total requirements were known. When the words "of a temporary measure" are linked with the words

"we are in the process of developing details of pricing for off-shore airports and we will be in a position to discuss your total requirements on contract basis",

"We will be calling on you again in due course to finalise a yearly contract with you based on contract terms",

"We look forward to your future contract within two weeks",

"You have indicated that our revised prices to you are attractive and it is expected that we will meet again with you shortly to finalise the business on a contract basis",

the whole thing seems to me to fall into shape. Those words in their context clearly mean that the efficacy of those documents was not made subject to the execution of a formal contract. In other words, the happening of that event, namely the execution of a formal contract was something which was going to put an end to the documents which the parties clearly treated as being operative. The dictionary meaning of "finalise" is

"coming to an end; making the last stage; ultimate; putting an end to something."

My whole reading of those letters is that there was an immediate binding contract based on the carnet card arrangement. If it was intended to show that the parties regarded themselves as entering into an agreement which was to last for a limited duration until something else took its place or superseded it, the word "temporary" would be the proper and apt word to describe that intention. The execution of a formal contract may be made a condition precedent to the existence of any binding arrangement, but the letters must be expressed in such a way as to show clearly that such a condition is intended; and that was not done here. There are no words appropriate for introducing a condition or stipulation in the manner recognised in *Chillingworth* v. *Esche*[4] and *Von Hatzfeldt-Wildenburg* v. *Alexander, supra.*

It is I think right that an order under R.S.C. Order 14 should be made only if the court thinks it is a plain case and ought not to go to trial. If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

I am satisfied that there are no triable issues. This is simply a case of construction of the letters passed between the parties and I decided that in favour of the plaintiffs. I therefore allowed the application with costs.

Application allowed.

THAM CHEOW TOH v. ASSOCIATED METAL SMELTERS LTD.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) January 22, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 22 of 1971]

Contract — Terms — Breach of — Goods not according to specification — Damages — Measure of — Contracts (Malay States) Ordinance, 1950, s. 74.

Sale of Goods — Breach of condition — Waiver — Election to treat as breach of warranty — Sale of Goods (Malay States) Ordinance, 1957, ss. 13(1) and 59(1)(b).

Damages — Sale of goods — Breach of warranty — Quantum.

This was an appeal from the decision of the High Court ([1971] 1 M.L.J. 271).

The defendant/appellant had agreed to sell a metal melting furnace to the plaintiff/respondent and had given an undertaking that the melting furnace would have a temperature of not lower than 2,600 degrees F. This specification was not satisfied.

The respondent brought an action alleging breach of an express condition of the contract and claimed the total sum of $29,301.38 as damages.

The learned trial judge held that the failure on the part of the appellant to supply a furnace according to specifications constituted a breach of the condition of the contract entitling the respondent to treat it as a breach of warranty, and awarded a total sum of $7,501.38 as damages for loss of profits.

The defendant appealed.

Held, dismissing the appeal: (1) the learned trial judge was correct in finding that there was a breach of a condition of the contract which entitled the respondent/plaintiff to waive it and to elect to treat the breach as a breach of warranty within the meaning of section 13(1) of the Sale of Goods (Malay States) Ordinance;

(2) this case fell within the provisions of section 74(1) of the Contracts (Malay States) Ordinance, *i.e.* when the damages arising are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Cases referred to:-

(1) *Hadley* v. *Baxendale* (1854) 9 Exch. 341.

(2) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528.

(3) *Simpson* v. *The London and North Western Railway Co.* [1876] 1 Q.B. 274.

(4) *Chaplin* v. *Hicks* [1911] 2 K.B. 786.

FEDERAL COURT.

Edgar Joseph Jr. for the appellant.

J. Puthucheary for the respondent.

Cur. Adv. Vult.

Ali F.J. (delivering the judgment of the court): By a letter dated 28th April, 1966 the appellant wrote to the respondent giving a quotation for the supply of one unit specially constructed tilting type lead melting furnace as *per* specification mentioned therein. The appellant offered to deliver it in about four weeks time after receiving from the respondent a confirmation of the order. Some four months later, the appellant again wrote on August 13, 1966 giving another quotation for slightly higher price and promising to make delivery in about 45 days after confirmation of the order. The specification of the furnace so far as it is relevant to the present dispute was expressed in these words: —

"The refractory used in the melting hearth will be Alumina Silica which can withstand temperature up to 2600 degrees F. The gas burner used will be of gas-air premix type which can produce to 2,000,000 B.T.U. per hour with the aid of a 2 H.P. blower."

The order was confirmed by the respondent writing on August 29, 1966 as follows: —

"To
Tham Engineerng Works,
3, Jalan Ampat,
Chan Sow Lin Road, K. L.

Please supply one high temperature tilting type metal melting gas fired FURNANCE, generally as your quotation dated 13 August 1966 @ $16,000 (dollars sixteen thousand only) *ex* works and charge to a/c of Associated Metal Smelters Ltd., 9 Jalan Tengah, Kuala Lumpur.

Signature
Director."

On September 2, 1966 the appellant wrote back to the respondent thanking them for the order which apparently was handed over by one Mr. David Wong who did not give evidence at the trial. In this letter the appellant gave word of assurance as follows:

"We wish also to assure you that the high temperature melting furnace will have a temperature of not lower than 2600 degrees F. and can be properly controlled by the Radiomatic Detector connected to the Temperature Controller."

According to the appellant's letter of May 9, 1967, the furnace together with the extra equipment purchased at $2,000 was delivered to the respondent on January 16, 1967. By this time there was already an exchange of correspondence between the parties relating to the inability of the furnace to reach the temperature of 2600 degrees F. From one of the letters by the solicitors of the appellant company dated May 18, 1967 there was apparently some talk about returning the furnace to the appellant and this had probably led the appellant to write: —

"Our client will not take back this furnace as it stands and denies any liability whatsoever to your clients in respect of the said furnace."

In the meantime, the respondent ordered new furnaces from Australia which arrived in September 1967. In a letter dated September 22, 1967, the respondent's solicitors M/s Skrine & Co. wrote to the appellant's solicitors M/s Shearn, Delamore & Co. informing that they had acquired two new furnaces from Australia to replace the one supplied by the appellant. The letter also said this: —

"Our clients have now acquired two new furnaces from Australia to replace the one supplied by your clients. Our clients have decided to keep the furnace supplied by your clients and sue the latter for damages suffered by our clients as a result of the furnace never reaching the temperature required for lead smelting for which it was purchased."

In November 1967 the respondent brought the action in this appeal alleging a breach of an express condition of the contract and claiming the total sum of $29,301.38 as damages. Of the amount claimed, $28,000 was for loss of profits, calculated at $200 per day for 140 working days. The appellant denied liability and counterclaimed for the price of the furnace and cost of extra equipments which, after deducting payments already made, amounted to $15,600. The learned trial judge gave judgment for the plaintiff, awarding a total sum of $7,501.38 as damages for loss of profits and dismissed the appellant's counterclaim The appellant has appealed against the judgment but not against dismissal of the counterclaim.

At the hearing, there was considerable dispute over the question whether or not the ability of the furnace to reach a temperature of 2600 degrees F. was a term of the contract. On the documentary evidence before him the learned trial judge held in the affirmative. On that view he found that there was a breach of an expressed condition entitling the respondent to waive it and to elect to treat the breach as a breach of warranty within the meaning of section 13(1) of the Sale of Goods (Malay States) Ordinance No. 1 of 1957. We would uphold this part of the judgment.

As provided in section 59(1)(b) of that Ordinance, damages is one of the remedies. The damages claimed by the respondent so far as it includes loss of profits was rejected by the learned trial judge for want of evidence. Be that as it may, he assessed loss of profits at $50 per day for 140 days and awarded $7.000 plus a sum of $501.38 in respect of other items The main complaint in this appeal is against award of $7,000.

The measure of damage recoverable involves the consideration of section 74 of the Contracts (Malay States) Ordinance which substantially affirms the rule of common law laid down in *Hadley* v. *Baxendale*(1) which was in two parts, namely (1) damage arising naturally, *i.e.* according to the usual course of things from the breach, and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. In

our view this case falls within the second rule which is that the appellant would not be liable for payment of damages for loss of profits unless there is evidence before the court that the special object of the furnace had been drawn to their attention and that they contracted on the basis that delay in delivery of the particular furnace would make them liable to payment of loss of profits. In this case it would appear from the evidence that the appellant knew they were required to deliver a furnace which could produce a temperature of 2600 degrees F. By their promise to deliver the furnace within 45 days after confirmation of the order, they must be assumed to have appreciated the urgency of the matter. In this way it is reasonable to think that any delay in the delivery of the required furnace would affect the business profits of the respondent. Here the learned trial judge would appear to have in mind, indeed he said so in his judgment, that the respondent must have suffered some loss of profits. As stated by Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*(2) at page 543: —

"..... but the true criterion is surely not what was bound 'necessarily' to result, but what was likely or liable to do so, and we think that it was amply conveyed to the defendants by what was communicated to them (plus what was patent without express communication) that delay in delivery was likely to lead to 'loss of business'."

On that principle the respondents are entitled to recover damage. The question is how much? In this case the appellant is saying that the amount awarded by the learned trial judge was execessive. It is true that the amount awarded in this case was merely conjectural. But there was at least some evidence before the court which might support the award. We refer to the evidence of PW1 Stevens Bailey Reynolds who said:

"....the furnace had a two ton capacity and we charge smelting fee of $150 per ton of which $75 goes in operation cost. Remainder is profit. However, at this time we had in stock scrap lead on which we could make a further profit of $25 per ton which together with $75 makes $100 per ton — for two tons $200. I produce a bill showing a charge of $150 per ton smelting fee.'

This part of the evidence of the plaintiff was not challenged in cross-examination. The learned trial judge, however, was not prepared to accept all of it and had, therefore, trimmed it down to $50 per day. It has not been shown in this appeal that the amount arrived at was unreasonable. As was stated by Cockburn C.J. in *Simpson* v. *The London and North Western Railway Company*(3) at page 277: —

"....as to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all."

The difficulty in assessing damage was also considered in *Chaplin* v. *Hicks*.(4) On page 795 Fletcher Moulton L.J. said: —

".... I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs. In such cases the Court weights the pros and cons and gives advice, and I may almost say directions, to the jury as regards the measure of damages. This is especially the case in actions relating to the sale of goods of a class for which there is an active and ready market. But in most cases it may be said that there is no recognized measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed, would work great wrong."

In *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd., supra,* Asquith L.J. also said to the same effect on page 543: —

"...we agree that in order that the plaintiff should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time on their agreement with the plaintiffs, of the prospect and terms of such contracts. We also agree that they did not in fact know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected."

We are, therefore, of the view that the award of the learned trial judge in this case, conjectural though it may be, was right in principle and ought not to be interfered with.

Appeal dismissed.

Solicitors: *Joseph & Son; Skrine & Co.*

KARUPPIAH v. PETALING GARDEN CO. SDN. BHD.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.) January 22, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 77 of 1971]

Contract — Housing development — Deposit on registration as purchaser — Whether earnest money — Whether there was concluded contract — Contracts (Malay States) Ordinance, 1950, ss. 65, 66 & 75.

This was an appeal from the decision of the High Court ([1972] 1 M.L.J. 11), dismissing the appellant's claim for a refund of $4000 paid as a deposit towards the purchase of a house.

The facts appear sufficiently in the judgment.

The appellant contended, *inter alia,* that there was no concluded agreement between himself and the respondent.

Held, dismissing the appeal: (1) the application for the purchase of the house constituted a completed contract;

(2) the deposit was earnest money, and as the appellant failed to proceed with the purchase, the respondent was entitled to forfeit it;

(3) section 65 of the Contracts (Malay States) Ordinance, did not apply to earnest money;

(4) section 75 of the said Ordinance did not apply when a contract was properly terminated and the deposit forfeited, whether or not damages were proved.

Cases referred to:-

(1) *H.C. Mills* v. *Tata Air Craft* A.I.R. 1970 S.C. 1986.

(2) *Linggi Plantations Ltd.* v. *Jagatheesan* [1969] 2 M.L.J. 253; on appeal to the Privy Council, *ante* p. 89.